Stand Up For California!
"Citizens making a difference"

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May 20, 2014

Honorable Jon Tester, Chairman
United States Senator
Chairman
Senate Committee Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510
Fax: 202 228 2589

Honorable John Barrasso
United States Senator
Vice Chairman
Senate Committee Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510
Fax: 202 224 5429

RE: Senate Indian Affairs Legislative Hearing of May 7, 2014 for the following bills: S. 2188, to amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes and, the Patchak Patch.

Dear Senators Tester and Barrasso:

Stand Up For California! is a nonprofit benefit corporation that acts as a statewide community watchdog focusing on gambling issues affecting the State of California. Our organization writes today regarding Senate Bill S. 2188. Additionally, we would like to respond to comments made by Assistant Secretary Washburn on the consequences of the recent regulatory change referred to as the Patchak Patch. We request our letter of comment to become part of the Congressional Record on S. 2188.

Our organization has been supportive of comprehensive reform of the fee to trust process for a number of years. We hope our organization's comments can be helpful as the committee moves this bill towards markup in preparation of a hearing. To the extent any legislation is offered to "fix" the decision in *Carcieri v. Salazar* by authorizing the Secretary of Interior to take land into trust for a tribe that was not "under federal jurisdiction" in 1934, Congress should take this opportunity first to develop a "Programmatic Policy" that addresses the most contentious aspects of the trust acquisition process Congress should carefully balance the interests of tribes, the states, and the federal government, by establishing clearly defined standards and objective criteria for the transfer of lands out of the regulatory authority of a state.

A legislative fix to the *Carcieri v. Salazar* case is greatly preferred over the usual judge-made Indian law that answers very small questions and ignores the impacts of the nature of tribal sovereignty on modern-day social-cultural, political and economic systems. It is also far preferable to an administrative resolution by the Department of the Interior, which vacillates from Administration to Administration and suffers from a poor procedural framework and ill-defined substantive standards that are easily manipulated. While the Department has a special

responsibility to Indians and tribes, and no particular obligations to states, local governments and communities, state and local governments and the affected community should, at least, know that there is a clear process through which their voices will be heard, understand the standards that will apply, and enjoy transparency in a decision-making process that so fundamentally affects their rights and property. Legislation based on the Code of Federal Regulations for transferring fee-lands into trust (25 C.F.R. 151), but with important modifications, may ensure that the temporal and federal jurisdictional issues raised by *Carcieri v. Salazar* are addressed for the future with a balanced approach between tribal needs and legitimate state, local and community interests.

S. 2188

Congress must come to face the fact that it has essentially legalized gaming in the United States and dictated it from the federal level to states and municipalities[1]. If Congress passes a "*clean Carcieri fix*" it will again expand gaming nationally. While the Department claims that there have been only a few gaming-related trust applications approved under this Administration, it has ignored the fact that lands placed in trust for other purposes may ultimately be used for gaming.

Congress must deal wholly and fully with the impacts caused in states and local areas populated with communities of non-Indian citizens who will directly and financially suffer the impacts of federally created gaming and it should require that lands proposed for trust acquisition be limited to non-gaming uses, if such use has not been declared at the outset. By doing so, Congress will substantially reduce state and local opposition to trust requests by alleviating the current suspicion and uncertainty regarding how the land will ultimately be used.

Tribal interests have established no case whatsoever that a Supreme Court decision should be reversed by a "clean fix" bill. The proponents have simply stated that the decision creates two classes of tribes. Yet the Department claims to have worked around that problem by issuing a legal interpretation of the IRA that purports to resolve *Carcieri* concerns. It did so without responding to the basic questions Congress sent to the Department in 2009 regarding the impact of the decision on Tribes to avoid having any standards imposed or engaging in real debate regarding the impacts of tribal gaming on affected communities, including tribes, which are now being torn apart from dis-enrollments

If this committee is to recommend a clean fix, it should be based on real evidence that answers the questions this committee sent to Bureau of Indian Affairs in 2009 and addresses whether reversing the United States Supreme Court ruling is sound policy?

Trust lands acquired by California's 110 tribes after 1988 are often used for gaming or ancillary projects to benefit the gaming operations. In an attempt to address the many impacts of after acquired lands in fee-to-trust conversions, California has included a land-use component in its tribal state gaming compacts. This component, a *"Memorandum of Understanding"* addressing land-use and public services between the tribe and affected local governments has helped to ease the many conflicts and grievances that have occurred in the surrounding

[1] Passage of the Indian Gaming Regulatory Act, October 17, 1988

communities. *However, the State's efforts through tribal state compact negotiations are unable to address the social, financial and legal impacts of non-gaming fee to trust acquisitions and their associated developments that create off reservation impacts.*

Transferring fee land into trust is a serious responsibility of the Bureau of Indian Affairs. It is a responsibility that requires decision makers to give serious consideration to the social and financial issues affecting not only tribal communities but also the non-tribal communities. Creating new trust lands for casino enterprises or other commercial or residential developments in the middle of "established community's" whether the proposed sight is in rural residential area or miles from an existing or former Indian lands in urban or metropolitan areas exacerbates impacts on the environment, infrastructure or lack of infrastructure, regional water supplies, air quality of local and state governments and the private property of non-tribal citizens.

The Bureau of Indian Affairs has long failed to recognize the interest of private citizens germane to the decision to convert fee land to trust land. The conversion of land into trust immediately affects where people live and enjoy outdoor recreation. The conversion of land into trust diminishes the local tax base, impacting local services. It diminishes the regional tax base affecting the state general fund. Further, it creates complex, multi-jurisdictional conflicts complicating the administration of justice and the ability of lawmakers and law enforcement officers to resolve ordinary everyday disputes.

Carcieri v. Salazar was brought forward by an application to acquire additional lands, stated to be for housing yet there were fears of a proposed casino. Indeed, the prospect of gaming under the Indian Gaming Regulatory Act (IGRA) has influenced such fundamental decisions, as tribal acknowledgment, tribal restorations, "reaffirmations," (a process not authorized by any law or regulation), tribes seeking to re-establish land in other states, enrollment and dis-enrollment, and gaming-related land acquisitions. California is dynamically affected by the acquisition of after-acquired lands for gaming and other purposes.

Claims of significant historic ancestral ties to specific locations are being fabricated to benefit out-of-state and foreign investors and avoid long-standing state gaming policy and gaming laws. Moreover, the developers and investors of these projects are circumventing zoning and California environmental laws. State agencies, regional sub-divisions of government and citizens are being directly impacted by lost taxes, loss of community control and impacts over scarce shared natural resources.

The proliferation of off-reservation gaming has caused an abuse of not only the exceptions found in IGRA, but of the Indian Reorganization Act - a policy developed to promote the self-governance and economic prosperity of tribes. This abuse makes the recent ruling of *Carcieri* a catalyst for reform and a "fix" an opportunity to restore the delicate balance of authorities between tribes, states as well as set standards for the Secretary of the Interior in the taking of land into trust.

The standards set forth in the Federal Code of Regulations are easily manipulated. The Secretary of the Interior has rarely denied an application, regardless of whether there is legitimate need and even when tribes have failed to identify any intended purpose for the land.

Imposing stronger federal standards and greater transparency in any and all fee to trust conversions would provide a significant mutually beneficial solution to citizens in the surrounding communities of a Tribes fee to trust conversion. The Committee may also wish to consider the benefit of requiring *"Memorandums of Understanding"* between Tribes and affected local governments in order to address the necessary mitigation of on reservation developments that create off reservation impacts. Further, *"Memorandums of Understanding"* would allow affected local governments to plan for the shared resources of the area, whether it is water, waste water disposal, night sky, air quality, transportation systems or public services. *The point is, we all live here together, we need to share these resources.*

THE "PATCHAK PATCH"

We agree with Secretary Washburn's conclusion that there should be certainty concerning the status of and jurisdiction over Indian lands after land is taken into trust and that land will remain in trust. Nevertheless, the Bureau of Indian Affairs recent rule change to 25 C.F.R. 151.12 - *Appeals of land Acquisition Decisions,* "The Patchak Patch", *does not provide that certainty.* Assistant Secretary Washburn intimated in the May 7th hearing, that the rule provided greater opportunity for local government as well as the public to participate in the process of fee to trust and to appeal final agency decisions. Further, in his comments to the Committee, he inferred that the "Patchak Patch" just needs a little time to demonstrate how it provides a solution.

The "Patchak Patch" does provide the Assistant Secretary a free pass from judicial review of his/her decision-making.

The "Patchak Patch" raises U.S. Constitutional issues and private property rights by authorizing the "taking" of land into trust without judicial review of the Secretary's decision. The action of taking the land into trust prior to a judicial review compromises litigants' ability to achieve due process and a fair and impartial hearing. Stand Up For California! has first-hand knowledge of this impact. Our organization is currently involved in two federal cases: *Stand Up For California v. Secretary of the Interior* and, *Citizens for a Better Way v. Secretary of the Interior.*

Both cases are challenges to the fee to trust process for land acquired for off-reservation gaming. The Tribes involved still have uncertainty over the status and jurisdiction of the land despite the Assistant Secretary taking the land into trust contrary to prior Bureau of Indian Affairs policy and regulation. The courts have both stated they will take the land out of trust should the citizens win on the merits of the case. The courts have further stated they will not take into consideration the expense the Tribes in the interim may incur for any development of the land.

Yet having the land acquired in trust prior to the resolution of the legal challenge makes it more difficult to obtain proper relief, when BIA has violated the law.

In the "North Fork Rancheria" lawsuit, the court issued a stay due to failure of the Bureau of Indian Affairs to comply with the Clean Air Act. A comment period was initiated providing affected parties an opportunity to comment. The comment period has

ended and the Bureau of Indian Affairs has re-issued its prior decision under the Clean Air Act. How can the Bureau of Indian Affairs take land into trust and believe it is in the best interests of a tribe and "not detrimental to the surrounding community", when the Bureau of Indian Affairs fails to comply with the regulatory requirements of the Clean Air Act? This is a perfect example of why a judicial review is necessary prior to the transfer of land into trust.

In addition, the "North Fork Rancheria" tribal state compact has been placed on a statewide referendum and is not yet in effect and will not be in effect unless there is a positive vote of the electorate in November 2014. The polling of the referendum has indicated more than a 60% NO vote.

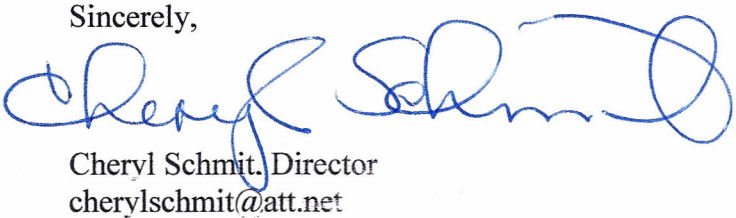
In the "Enterprise litigation", the Bureau of Indian Affairs has not been able to issue a complete administrative record after more than a year of taking the land into trust. The Tribe currently appears to be moving toward the development of a class II gaming facility. In fact, Bureau of Indian Affairs based much of its decision-making on an incorrect title description for land twice the size of that which was contemplated in the Tribe's application. Without adequate review, Bureau of Indian Affairs may transfer land into trust that is not even land that the Tribe properly owns. If it does so, the Quiet Title Act could preclude the actual owner from challenging title when the error is discovered, if outside the statute of limitations for an Administrative Procedures Act challenge or if the owner did not participate in proceedings before the Interior Board of Indian Appeals, where Board review is applicable.

The BIA's justification for the "Patchak Patch" is misplaced and the Patch does nothing to resolve the problem that *Patchak* actually created. Because of the Patch, challengers must invest in costly motions for preliminary injunctions and courts must squander resources in resolving such motions. The problem that *Patchak* created, however, is allowing Administrative Procedure Act challenges long after the tribal projects, like housing, casinos and health care facilities have broken ground. Putting land in trust quickly does nothing to address that problem.

Moreover, *Salazar v. Patchak* did not change the law. Rather the U.S. Supreme Court made clear that the Bureau of Indian Affairs has been misapplying the law for years. As a practical matter, it is the Bureau of Indian Affairs that has established a long standing policy to disregard the legitimate concerns of affected parties that has created problems. It is the Bureau of Indian Affairs' failure to recognize the legitimate concerns of the non-tribal communities that has brought about costly, difficult and protracted legal challenges.

Stand Up For California! requests that our comments become part of the Congressional Record for S. 2188. We hope you will consider our comments as the committee moves forward to markup the legislation and prepare for a vote. We seek reform which creates a framework limiting the authority of the Secretary of the Interior and which promotes guidelines establishing reasonable, fair standards and objective criteria for the transfer of lands out of the regulatory authority of a state.

Sincerely,



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CC: United States Senator Dianne Feinstein